

# PUBLICATION

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## More Trouble for Facebook: Are Targeted Content Options "Aiding and Abetting" Age Discrimination in Job Ads?

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**Concerns about Facebook's use and manipulation of user information is not limited to the recent controversy involving the data shared with Cambridge Analytica. Facebook was also accused by several large employers of aiding and abetting potential age discrimination in job recruitment across the nation.**

In December 2017, it was revealed that the platform offered by Facebook to employers allows them to post advertisements that only appear on the Facebook pages of certain individuals. This selective posting is referred to as "targeting" or "targeted content." Specifically, Facebook provides the option to these employers to have various job postings shown only to younger individuals. These postings, for example, would show up on the Facebook pages of individuals between the ages of 25 and 35, but not on the pages of individuals over the age of 35. Older individuals did not have the opportunity to even learn about these job postings targeted to younger individuals.

The *New York Times* revealed this practice in [an article](#) published in conjunction with ProPublica on December 20, 2017. The article named several large employers, such as Verizon, who have entered into agreements with Facebook to place job postings targeted solely to younger individuals. In one example cited in the article, Verizon placed a job posting on Facebook for a financial planning and analysis position. The posting was displayed only to Facebook users who were 25 to 36 years old, effectively weeding out applicants over the age of 36. The article revealed a potentially unreported trend among major employers, including Facebook itself, of placing job postings that are visible only to individuals who fall within certain identifying categories.

Many lawyers and other advocates have argued that this targeted job posting practice facilitated by Facebook potentially violates the Age Discrimination in Employment Act of 1967 (the ADEA), which prohibits discrimination against individuals 40 years old or older in hiring or employment. Not only could employers be potentially running afoul of the ADEA by targeting their job postings towards younger candidates, critics suggest that Facebook could be viewed as "aiding and abetting" this potential age discrimination in violation of the ADEA.

Not surprisingly, Facebook has defended this "targeted content" practice as responsible, age-targeted advertising that ultimately benefits people of all age groups. In essence, this practice ensures that users view postings for jobs for which the user is more likely to be hired.

Facebook has also argued that it is immune from legal liability for how employers choose to target their job postings, claiming cover under the Communications Decency Act (the CDA).

In essence, the CDA shields Internet services and technology companies, like Facebook, from liability based on a third party's content shared through the platform. In this scenario, Facebook would argue that it is the employer's decision to target individuals under the age of 40 for certain positions, and that Facebook, while facilitating the practice technologically, is not responsible for any potential age discrimination in employment. The CDA specifically states that, "No provider or user of an interactive computer service shall be treated as the

publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). In short, Facebook asserts under the CDA that it is not responsible for the content posted by third parties and that it is further not responsible for the way it posts content, as requested by third parties (e.g., posting ads to only appear to individuals aged 25 – 35). Facebook has used the CDA in previous claims of race and age discrimination, and also in cases asserting aiding and abetting of terrorism, defamation, discriminatory housing advertisements, negligence, violation of anti-sex-trafficking laws, and public nuisance.

Given this relatively uncharted area of age discrimination claims (and other types of discrimination under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act), politicians and lawyers have begun to address the issues posed by targeted content.

For example, Senate Bill 443, introduced by Pennsylvania Democratic Senator Robert Casey, would amend the ADEA statute to make it effectively easier for older individuals to prove age discrimination in employment decisions. Senator Casey, along with Maine Republican Susan Collins, also wrote to Facebook, Google and LinkedIn, asking them for details as to the number of job posting advertisements on their respective platforms that are targeted by age group, and seeking information as to whether these social media platforms have any tools or safeguards in place to prevent potential age discrimination in job recruitment.

A lawsuit on behalf of the members of the Communications Workers of America and Facebook users over the age of 40 was filed in California federal court against various employers, including Amazon and T-Mobile, who allegedly placed ads on Facebook with the condition that the ads be displayed only to younger people. The complaint alleges that these employers who contracted with Facebook to display ads targeted exclusively to younger individuals violated the ADEA's prohibition on age discrimination in hiring. After the lawsuit was filed, Amazon announced that it did not intend to limit its ads to younger individuals and that it would revise its agreement with Facebook to ensure the ads would be visible to older users as well. Facebook itself, however, was not named in the lawsuit due to the company's protection under the CDA.

Advocates for more regulation of targeted content and advertising suggest that employment discrimination laws need to be reevaluated in light of technological advancements and the ability of third parties, such as Facebook, to aid and abet potentially illegal job recruitment. These concerns are particularly heightened recently as Facebook users have learned that their personal data and information is not only being shared with third parties, but also being used to tailor and limit the content they see on their Facebook pages.